

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

DEC 10 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0190-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MICHAEL ANTHONY COLMENERO,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20050544

Honorable Ted B. Borek, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Michael A. Colmenero

Buckeye
In Propria Persona

B R A M M E R, Judge.

¶1 A jury found Michael Anthony Colmenero guilty of two counts of aggravated assault, both dangerous-nature offenses, and one count of possession of a deadly weapon by a prohibited possessor. The trial court sentenced him to concurrent, presumptive terms

of imprisonment, the longest of which was 7.5 years. We affirmed his convictions and sentences on appeal. *State v. Colmenero*, No. 2 CA-CR 2006-0189 (memorandum decision filed Apr. 5, 2007).

¶2 Colmenero then filed a timely notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. In his ensuing petition, relying on *State v. Donald*, 198 Ariz. 406, ¶ 11, 10 P.3d 1193, 1198-99 (App. 2000), he argued his trial counsel had been ineffective in failing to adequately inform him about the consequences of accepting or rejecting a plea offer from the state. According to Colmenero, his counsel had told him of a plea offer that would have made probation available as a disposition but had failed to explain the advantages of accepting such a plea.

¶3 Finding that Colmenero had alleged a colorable claim, the trial court held an evidentiary hearing to determine whether counsel's performance had been deficient and, if so, whether Colmenero had been prejudiced as a result. *See id.* ¶ 15; *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); Ariz. R. Crim. P. 32.8. Based on the testimony of both Colmenero's trial counsel and the prosecutor, the court found that no plea agreement had ever been offered to Colmenero and that he had therefore failed to establish either deficient performance by counsel or resulting prejudice. The court dismissed his petition, and this petition for review followed. We will not disturb the court's ruling absent a clear abuse of its discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶4 In his pro se petition for review, Colmenero maintains “the state presented insufficient evidence supporting its opposition” to his petition. He also argues the trial court abused its discretion in not ordering, sua sponte, that trial counsel produce Colmenero’s case file. Colmenero reasons that, “even if trial counsel had not been provided with the written plea agreement, he would have written notations” in the case file about plea negotiations.

¶5 We review a trial court’s factual findings after a Rule 32 evidentiary hearing for clear error. *State v. Herrera*, 183 Ariz. 642, 648, 905 P.2d 1377, 1383 (App. 1995). Because it is the petitioner’s burden to prove the allegations that support his claim for relief, Ariz. R. Crim. P. 32.8(c), the question before us is whether the court erred in finding Colmenero had failed to meet that burden, not whether the state presented sufficient evidence rebutting his claims. Colmenero’s testimony that the state had offered him a probation-available plea agreement was based only on his recollection of a telephone conversation with his trial counsel, who, in turn, testified that no such offer had ever been made or communicated to Colmenero. Counsel stated he had only advised Colmenero that, if the state offered a probation-available plea agreement, he should accept it. Counsel also reported that the state had been unwilling to extend such an offer.

¶6 Consistent with trial counsel’s recollection, the prosecutor who handled Colmenero’s case testified he had researched both the physical file and computer records in his office and had found no evidence that any plea agreement had been offered. He also stated that it was his practice to request a hearing pursuant to *Donald* if a defendant rejected

a plea offer; thus, the fact that he had never requested such a hearing lent further support to his recollection that no plea agreement had been offered. We see no error in the trial court's well-supported findings and will not disturb them. *See Herrera*, 183 Ariz. at 648, 905 P.2d at 1383; *see also State v. Gerlaugh*, 144 Ariz. 449, 458, 698 P.2d 694, 703 (1985) (court's determination that defendant failed to sustain burden at Rule 32 evidentiary hearing "entitled to significant deference").

¶7 Nor are we persuaded by Colmenero's argument, unsupported by citation to legal authority, that the trial court should have required counsel to disclose his case file. Colmenero did not make such a request below and, notwithstanding his speculation about what the file might have contained, the court was not obliged to independently investigate potential impeachment evidence on his behalf. The court did not abuse its discretion in ruling based on the evidence presented at the hearing.

¶8 In sum, Colmenero's petition for review presents no meritorious reason to set aside the trial court's ruling. Accordingly, although we grant the petition for review, we deny relief.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOHN PELANDER, Chief Judge

JOSEPH W. HOWARD, Presiding Judge